

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1326

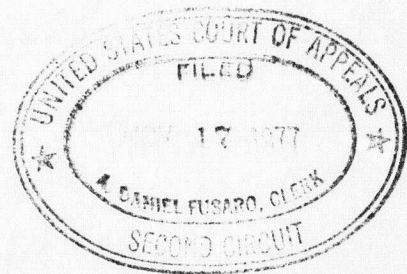
To be argued by
HENRY WINESTINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
FRANK MANGAN and
KEVIN MANGAN,
Defendants-Appellants.
-----x

B
P/s
Docket No. 77-1326
Docket No. 77-1339

BRIEF FOR APPELLANT
FRANK MANGAN



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Were hearsay declarations of a co-conspirator admitted without adequate proof that they were in furtherance of a conspiracy and that appellant Frank Mangan was a member of the conspiracy?

2. Were federal income tax returns and papers from a personnel file erroneously admitted in evidence as examples

of appellant's handwriting in the absence of any proof authenticating them as having been written by appellant Frank Mangan?

3. Were federal income tax returns erroneously admitted in evidence against appellant, both for their content and as handwriting exemplars, when they had been disclosed in violation of a criminal statute?

4. Was it error to admit evidence of the purchase by appellant Frank Mangan of securities as probative of guilt where there was no proof of the actual amount of money expended, of appellant's impecunious condition prior to the purchases, or that the purchases were not reasonably within appellant's means?

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal by Frank Mangan from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles E. Stewart) entered on July 26, 1977, after a jury trial, convicting appellant of one count of conspiracy to file false claims against the Government (18 U.S.C. §286), five counts of mail fraud (18 U.S.C. §1341), and seven counts of aiding and assisting in the submission of false federal income tax returns (26 U.S.C. §7206(2)). Appellant was sentenced to concurrent terms of two years' imprisonment. He remains free on bail pending appeal.

By order dated August 12, 1977, this Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel for Frank Mangan on appeal, pursuant to the Criminal Justice Act.

Kevin Mangan, appellant's brother, was a co-defendant and was convicted of the same crimes as appellant.

STATEMENT OF FACTS

In January 1972, seven federal income tax returns were filed with the Internal Revenue Service for the tax year 1971, each of them indicating refunds due in amounts ranging from \$8,872.04 to \$9,421.77 (25-30*).

The returns had been filed in the names of actual taxpayers (six different "John McCarthy's" and a "Scott Murphy") and set forth their proper Social Security numbers. Later in the year, when the true McCarthy's and Murphy filed their returns, it became apparent that the seven returns filed in January were false (30-31). By that time six refund checks had been issued, five of which had been paid.**

*Numerals in parentheses without prefix refer to pages of the trial transcript. Numerals preceded by "H" refer to pages of the transcript of the pretrial suppression hearing.

**One return had a temporary Social Security number, which is a number arbitrarily assigned by the IRS to returns which lack a proper number. Control procedures within the IRS prevented a refund check being issued in that case (33-35). One of the refund checks which had been issued was never cashed.

Investigation by the IRS disclosed that the taxpayers' addresses on the returns were rooming houses or transient hotels (31), and that the employers shown on the accompanying W-2 forms, although actual firms, did not exist at the addresses given (33). Most of the refund checks had been deposited in three different individual bank accounts, with the proceeds then paid out in cash (124) or to a corporate bank account of "McCarthy Enterprises, Inc." (107-110, 112, 119-125, 267-268). One check had been deposited directly into the corporate account (267).

Although a fingerprint of value had been developed on a corporate banking resolution used to open the corporate account (270-272, 275), it had not been identified. Efforts to determine the responsibility for the false returns were unsuccessful, and the investigation was closed in 1974 (1128).

A. The Prosecution Testimony Relating to Kevin Mangan*

The evidence against Kevin consisted of the testimony of John M. Bertsch and the opinions of experts that fingerprints on three of the exhibits and the handwriting on some of them were Kevin's.

Bertsch testified as an admitted accomplice who had agreed to testify against both defendants in exchange for the acceptance of a proposed guilty plea to three misdemeanors (170, 238-240, 442-445). He had not yet pleaded at the time of the trial

*For convenience, Frank Mangan will hereinafter be referred to as "Frank" and Kevin Mangan as "Kevin."

(171) and no sentence had been agreed upon (226), but he hoped to avoid a prison sentence (444-445).

Bertsch testified that he had first met and become friendly with Kevin in 1966 when both were employees of Howard Johnson's (144) and both had worked their way into managerial positions (376). Bertsch went into the Army in May 1968 and was discharged in May 1971 (144). After his discharge, and while he was drawing both unemployment (144) and veteran's educational benefits (388-389), he went to work as a bartender for Kevin, who was then operating the dining facilities at Tall Tree Golf and Country Club (144-145, 378) as well as a catering business (382).

Late in 1971 (1402-1403), Kevin left Tall Tree and moved his business operations to a garage in Sound Beach, where the catering business was conducted by a corporation, American Banquet Corporation (381-383). Bertsch and another business associate, Ray Nazzaro, assisted in the move, including the substantial construction work needed to make the new building suitable (381). Nazzaro testified that among the papers brought to the new quarters were a large variety of blank forms for business, corporate, and tax purposes. These were kept on a table in the new office (1404-1407).

In another venture, Kevin obtained a leasehold on a shell of a building at 4020 Hempstead Turnpike in Bethpage and partitioned it into rental office space (159). The construction work, like that at Sound Beach, was largely done by Kevin,

Bertsch, and Nazzaro (393). Kevin had plans to operate a real estate management business through a partnership, JK Management, and had organized a corporation, Vast Industries, Inc., which apparently was to be a holding company for the several ventures (389, 391). Bertsch and Kevin had become close friends (395), and it was Bertsch's hope that he would become a full partner in these ventures (393); he had signed the partnership agreement of JK Management and was an officer of Vast Industries (391).

According to Bertsch, he had several conversations with Kevin in late 1971 (145). In those conversations, Kevin mentioned that he expected to receive money from the Government by filing false income tax returns. According to Bertsch, Kevin told him that Frank, then an IRS employee, would obtain the names of legitimate taxpayers, and tax returns would then be filed in their names. Kevin was to open bank accounts and rent apartments in the names of the taxpayers so that refund checks could be received and deposited (145-146). These conversations took place in Kevin's car and in a bar (145).

Bertsch asserted further that in February or March 1972 he accompanied Kevin on several occasions to Manhattan, the Bronx, and Westchester to pick up checks (146-149) and go to banks (149-150). Before going into one bank in Westchester, Kevin stated that he was opening an account with the use of a false ROTC card for identification.* On another visit to a

*Bertsch conceded that in a subsequent venture in which he

bank Kevin returned with a large sum of cash he had withdrawn and Bertsch had seen "some of those government checks" in Kevin's possession. He did not observe the banking transactions, as he had waited outside in the car (151-152). He had also accompanied Kevin when the latter had purchased a corporate outfit at a stationery store and visited an empty office which Kevin had rented to use as a mailing address for a corporation (153-154).

Bertsch stated that, at Kevin's request, he had opened a checking account at the National Bank of North America in March 1972 (154). Bertsch deposited \$20,000 to \$25,000, which Kevin had given him in cash, in the account (154). (The first bank statement for the account, GX-44, shows the opening deposit to have been made on March 23, 1972.)

According to Bertsch, \$1,000 of the money given him by Kevin was used as a down payment on a house (155), which was to be conveyed to Kevin after title was taken (156). Another \$3,000 or \$4,000 was given to a friend of Bertsch's, Edward Quinn, who also was to purchase a house and deed it to Kevin. Quinn, however, refused to participate, and returned the money to Bertsch, who returned it to Kevin. Bertsch testified that he returned the entire \$20,000 to \$25,000 to Kevin, mostly in

(Footnote continued from the preceding page)

operated a bar with another friend, they had encountered problems with the sale of liquor to minors who used false identification (434). As a youth, Bertsch himself had used false identification cards in order to purchase liquor (378).

checks payable to Kevin or his business firms, Vast Industries and JK Management (156-158). On cross-examination, however, Bertsch conceded that after taking title to the house he did not convey it to Kevin, but still owned it with his partner Quinn (371), and in fact Bertsch was living in it at the time of trial (406). Faced with the cancelled checks from his own bank account, he admitted that they showed only about \$8,000 being paid to Kevin or Kevin's businesses (424-425, 428).

Bertsch severed his business relationship with Kevin in September 1972 because it was producing so little income (405), and joined forces with Edward Quinn operating bars and later a business brokerage firm (407). He admitted making false answers on two applications for liquor licenses (432-433) and on a bank loan application (450-451).

Beyond the Bertsch testimony, the only evidence linking Kevin with the false tax returns were fingerprints, conceded to be Kevin's, on one of the seven false tax returns (and on its accompanying W-2 form) (1328-1329), and on the "McCarthy Enterprises, Inc." banking resolution used to open the corporate bank account (786). The Government's experts stated that there was no way in which it could be determined whether the prints had been on the forms prior to their being filled out (801, 1373-1374). There were a total of three other fingerprints on two of the refund checks. An expert, Zachary Levin, testified that these were Kevin's (1335), but he was unable to describe the points of similarity between them and Kevin's

fingerprints (1348-1354), and stated that he could not examine the prints under the conditions in the courtroom, even though offered a magnifying glass to assist him (1351). He had made no notes regarding the similarities (1340, 1346), and had not prepared blow-ups of those prints (1345-1346) which would have been the only way of presenting similarities in a manner which the jury could observe. As to the prints on the checks, the jury was therefore left with the expert's positive identification and the defense had no way to cross-examine as to the basis for the identification.

A handwriting expert of minimal qualification (see the extended voir dire, 805-852, and objection to his qualifying as an expert, 853) testified that the handwriting on a number of the documents used to open the McCarthy and Murphy bank accounts was the same as the writing (other than the signatures, which were not used for comparison) on a number of American Banquet Corporation checks (858-860).* Bertsch had testified that those checks were in Kevin's handwriting (198), but conceded that both he and Ray Nazzaro frequently filled out American Banquet Corporation checks before Kevin signed them (185, 393). Nazzaro, called as a defense witness, testified that a number of checks used as exemplars (Defense Exhibit P) had been written by him or another employee (1408-1413, 1419-1420).

*These checks were among documents stolen from Kevin's files, and were the subject of a pretrial suppression hearing.

The expert testified that handwriting exemplars supplied by Kevin at the request of the Government were dissimilar from the questioned bank documents (959-970). The Government also brought out that on a bank form used to open the McCarthy Enterprises corporate bank account the name "James Morrow" was listed as a reference (320). There was testimony that Kevin, on occasion, identified himself as James Morrow in conducting the catering business (149) in order to give the impression that the business was larger than it actually was (1433-1434). Bertsch was fully aware of this fact (404).

Defense witness Nazzaro testified that on March 22, 1972, the day on which a large withdrawal had been made from one of the McCarthy bank accounts (GX-22D), he had spent the entire day with Kevin. March 22 was Kevin's birthday, but the two men had been together working all day at the grimy job of moving Nazzaro's belongings to a new residence. They ended up at Nazzaro's house, where Nazzaro suggested that they celebrate their birthdays together. Nazzaro recalled that Kevin's shirt was dirty and that he gave Kevin a new shirt (a birthday gift to Nazzaro from his fiancée) to wear when they later went out to celebrate (1414-1415).

B. The Prosecution Testimony Relating to Frank Mangan

Only five items of evidence linked Frank to the tax refund scheme:

- (1) He was Kevin's brother.

(2) He was an employee in the Mineola branch office of the Brooklyn District of the Internal Revenue Service (136-137) and therefore had access to the records relating to the genuine McCarthy's and Murphy. This access, however, was shared by literally thousands or tens of thousands of other IRS employees, not only in the Mineola office, but in the main Brooklyn District office and the Smithtown, Riverhead, Jamaica, and Flushing branch offices and the Andover, Massachusetts, regional office as well (140-141).

(3) Over objection, John Bertsch testified, as related above, to conversations with Kevin in which Kevin described the scheme and stated that Frank's role was to obtain the names of genuine taxpayers from IRS records (145-146). Bertsch also testified that in another conversation Kevin stated that he intended to cheat Frank of part of the proceeds by falsely claiming that one of the refund checks had never been received (165).

(4) A handwriting expert employed by the New York City Police Department testified that in his opinion the handwritten block printing in the false McCarthy-Murphy returns had been written by the same person who filled out two joint tax returns (GX-38, GX-40) filed in the name of Frank and Jeanne Mangan and also some forms (GX-43) in an IRS personnel file relating to Frank (607).* The Government offered no testimony to authen-

*The signatures on the tax returns and personnel file were not used for comparison. Nor did the Government expert utilize

ticate the Mangan joint tax returns and personnel file material as having actually been written by Frank. The only basis for the admission of these documents was a stipulation that, if called, a Government witness would testify that these items had come from IRS files (554-555). Of the several points of similarity between the writing on the McCarthy returns and that in the exemplars (618-622), the expert conceded that some were common, such as the use of customary abbreviations "pub" and "ch" for "publications" and "church" (649-650, 654). In addition, it was shown that there were notable differences between the questioned returns and the exemplars in the use of other abbreviations (655-657, 695-699). Other purported similarities were conceded to be characteristics typical of standard copybook systems of handwriting, rather than idiosyncracies of the writer (715-716), and therefore of no substantial value for purposes of comparison. Six of the similarities on which the expert relied for his opinion were found in the witness' own handwriting (720-726).

(5) A chart prepared by an IRS group manager, John Petito, from the Frank and Jeanne Mangan joint returns for 1972 and 1973 (GX-78) showed, according to Mr. Petito's testimony, that stock purchases made by Frank in 1972, after the issuance of the Murphy

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voluminous numbers of specimens of Frank's handwriting which were supplied at the prosecution's request (GX-49A-49G) which he stated were dissimilar from the writing on the McCarthy-Murphy returns (623).

and McCarthy refund checks, were made at purchase prices \$12,123.37 greater than the market value of securities sold during the period (1218). Mr. Petito also testified that the Mangan tax returns showed substantial amounts as partnership losses and that the McCarthy and Murphy returns were also written to reflect partnership losses (1169-1172).

The jury found both Frank and Kevin guilty on all counts. Frank was sentenced to concurrent two-year terms of imprisonment on each count.

SUMMARY OF ARGUMENT

Appellant Frank Mangan's conviction was based upon a number of interrelated errors. Incriminating declarations of an alleged co-conspirator were not in furtherance of the conspiracy and with insufficient evidence that appellant was a member of the conspiracy.

The minimal proof in the record linking appellant to the conspiracy was derived almost entirely from income tax returns filed on behalf of appellant, which were used as handwriting exemplars and (because they reflected modest purchases of securities) to show "sudden acquisition of wealth." Those tax returns should not have been admitted because their disclosure was in violation of 26 U.S.C. §6103, as amended by the Tax Reform Act of 1976. Even if admissible, the handwriting on the tax returns was not authenticated as being appellant's. The securities purchases reported on the tax returns did not evidence affluence, and in the absence of proof of appellant's prior financial condition, the transactions did not establish sudden acquisition of money, a necessary factor for admissibility.

In addition to these arguments, appellant expressly relies on each of the issues raised in the brief of co-appellant Kevin Mangan.

ARGUMENT

Point I

PREJUDICIAL HEARSAY DECLARATIONS
OF AN ALLEGED CO-CONSPIRATOR WERE
ERRONEOUSLY ADMITTED AGAINST AP-
PELLANT FRANK MANGAN.

Over strenuous objection (73-76, 134-135, 145) and motions to strike (1392-1393, 1443), the trial court admitted hearsay testimony from John Bertsch purporting to link Frank to the filing of false returns. Bertsch testified that Kevin, in describing the scheme to him, stated that Frank, as an employee of the IRS, was to obtain information about legitimate taxpayers in whose names false returns would be filed (145-146) and that Kevin intended to cheat Frank by advising him that one of the refund checks had not been received so that Kevin could keep the entire proceeds for himself (165). That testimony, which had an obviously devastating impact against Frank, was admitted as being within the co-conspirator exception to the hearsay rule. The Government failed, however, to establish the conditions that would have made the hearsay admissible.

The co-conspirator rule is codified in Rule 801(d)(2)(E) of the Federal Rules of Evidence, which provides that "A statement is not hearsay if * * * [it] is offered against a party and is * * * a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy." This is derived from a long line of cases, of which the leading one in this Circuit is United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969),

cert. denied sub nom. Lynch v. United States, 397 U.S. 1028 (1970). Under Rule 801, three circumstances must be established before co-conspirator declarations may be admitted: (1) they must have been made during the conspiracy, (2) in furtherance of it, and (3) there must be satisfactory non-hearsay evidence that the defendant was a member of the conspiracy. Geaney holds that the defendant's membership in the conspiracy must be established by a preponderance of the evidence.* No standard appears to have been articulated with respect to the other issues, but it would seem that the burden of proof should be at least as great.

While the contents of the declarations in this case indicate that they were made during the course of the conspiracy, if in fact there was one, there is no proof at all that they were made in furtherance of it. If Kevin was simply bragging to Bertsch about his exploits, then the declaration was not in furtherance of the scheme. The minimal evidence adduced by the Government strongly indicates that to be the case. The relationship between Kevin and Bertsch was that of the experienced, ambitious entrepreneur to the younger man who hoped to become a

*Appellant contends that due process mandates a higher degree of proof, see Weinstein, EVIDENCE §801(d)(2)(E)[01], n.30; United States v. Nixon, 418 U.S. 683, 701 n.14 (1974). That contention has been rejected by this Court, however, United States v. Wiley, 519 F.2d 1348, 1350-1351 (2d Cir. 1975), cert. denied sub nom. James v. United States, 423 U.S. 1058 (1976); United States v. Glazer, 532 F.2d 224, 228-229 (2d Cir. 1976); United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977).

partner in the business. It was only natural that the older man would brag, and it is that sort of puffing which, as one commentator has warned, is a strong indicator of unreliability. Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions, 85 Harv.L.Rev. 1378, 1395 (1972).

It is true that at some point Bertsch became involved in the scheme, and if the declarations related to Bertsch's participation, then they might have been in furtherance of the conspiracy. On the record in this case, however, that conclusion would be pure conjecture, and conjecture cannot take the place of proof on an issue where the burden rests with the prosecution.

What little evidence there is indicates that the declarations were made long before Bertsch joined the conspiracy. The conversations were held in late 1971. Bertsch did nothing regarding the scheme until he opened a bank account on March 23, 1972, into which, he asserted, the proceeds of the refund checks were channeled. That leaves a gap of at least several months between the statements and any act of Bertsch's which aided the scheme. This suggests that the statements in no way furthered the conspiracy.

Similarly, Bertsch's testimony of a conversation with Kevin in which the latter stated that he intended to cheat Frank out of his purported 50 per cent share of the proceeds (165) is silent as to the circumstances. Not even the date is indicated. Thus, there is even less basis (if that is

possible) for deeming it to have been made in furtherance of a conspiracy.

Moreover, by its very nature, the statement about cheating Frank could not have been made in furtherance of the conspiracy: it was an admission by Kevin that he intended to act contrary to and in derogation of the purported conspiratorial agreement. This completely undermines the only logical basis for admission of a co-conspirator's declarations: that the conspiracy makes each conspirator the agent of the others, so that the statements of one in furtherance of the conspiracy are made on behalf of all. Weinstein, EVIDENCE, ¶801(d)(2)(E) [01]. Surely, no matter how explicit the illegal agreement, it flies in the face of reason to argue that Kevin's statement that he intended to cheat Frank out of the fruits of the criminal scheme was made as Frank's agent. Yet this was probably the most damaging of all evidence against Frank in terms of its impact on the jury. The other evidence of guilt was dubious at best. As noted above, Kevin's discussion of the mechanics of the scheme can be dismissed as barroom braggadocio, but his claim that he was planning to cheat carries an added element. Not only was it against his penal interest, but was in addition an admission of dishonesty within the conspiratorial framework.

The express requirement of Rule 801(d)(2)(E) that declarations of a co-conspirator be in furtherance of the conspiracy must be given full effect. It was carefully and deliberately included. The equivalent provision of the Model Code of Evi-

dence -- which omits the "in furtherance of" language -- was considered and rejected. Weinstein, EVIDENCE ¶801(a)(2)(E)[01].

Beyond the total absence of evidence that Kevin's hearsay declarations were in furtherance of the conspiracy is the less-than-minimal non-hearsay evidence that Frank was a member of the conspiracy. The only proof in the record is (1) the fact that Frank is Kevin's brother, (2) Frank's access to IRS records containing names and Social Security numbers of legitimate taxpayers, (3) the opinion of the Government's handwriting expert that the false returns were printed by the same hand as Frank's own returns and papers in Frank's personnel file, and (4) an analysis of Frank's stock purchases and sales, purporting to show that in 1972 he invested \$12,000 in such trading.

The fact that Kevin and Frank are brothers is such marginal proof of Frank's complicity that it should be given no weight at all. Frank's access, as an IRS employee to taxpayer records has no substantial force as evidence of his participation since such records were equally available to literally thousands of IRS employees in the Brooklyn, Jamaica, Flushing, Riverhead, and Smithtown IRS offices, as well as the regional office in Andover, Massachusetts. Evidence that the fictitious returns were written in Frank's handwriting and the purchase by him in 1972 of securities having a market value of \$12,000 should not have been admitted, as we show in Points II, III, and IV, infra. But even if admissible, the testimony had little probative value once it was successfully impeached on cross-

examination.*

Of the several items of similarity between the writing on the fictitious returns and that on the joint returns filed on behalf of Frank and Jeanne Mangan, many (such as the use of abbreviations) were so common as to be meaningless. Other similarities were characteristic of standard copybook handwriting systems, and therefore of no significance for purposes of identification. And no fewer than six items of similarity were found in the expert's own handwriting.

The modest stock purchases, if made on margin, would have cost only \$6,000, and there was no evidence to suggest that the price was not covered by a pre-existing credit with the broker, from savings, or from a loan. This was certainly inadequate proof that Frank was a member of a conspiracy.

To be admissible, co-conspirator hearsay must meet not only the standards of the rules of evidence; it must also comport with the mandate of the Sixth Amendment confrontation clause. Dutton v. Evans, 400 U.S. 74 (1970). As Dutton was interpreted by this Court in United States v. Puco, 476 F.2d 1099, 1107 (2d Cir. 1973) (decision on petition for rehearing), cert. denied, 414 U.S. 844 (1973), the trial judge must find

*While its weight was minimal on an objective analysis, its impact on the jury was a different story. The jury received the full impact of the handwriting expert's conclusions, but the impeachment involved a mass of detail which the jury may not have been able to follow, or to grasp it if did follow the questioning. The impact of the securities purchases as indicating "sudden unexplained wealth" is discussed in Point IV, infra.

that the "statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination." While the fact that the declaration of a co-conspirator is against penal interest is some indication of reliability, there are other significant factors which must be considered. Most important are the circumstances in which the declaration is made and the relationship of the declarant to the third party. As already noted, the statement in this case was made by Kevin in what must be assumed to be casual conversations with Bertsch. If the conversations were as Bertsch recounted them, they had all the earmarks of having been made to impress Bertsch that Kevin was engaged in a bigtime, sophisticated scheme. The circumstances were exactly those where exaggeration and puffing were likely to occur. Moreover, the inculpatory references to Frank -- the primary concern on this appeal by Frank -- are inherently unreliable. A declarant's inculpation of a third party should not be admitted:

Such direct personal references are generally far too devastating to be treated lightly. They bear directly on the questions of the defendant's guilt as an individual and will usually weigh heavily in the minds of the jurors (with the consequent and greatly increased danger of carrying over and giving extra, undeserved weight to any independent evidence introduced).

Davenport, *supra*, '85 Harv.L.
Rev. at 1397.

Point II

HANDWRITING EXEMPLARS USED TO LINK
APPELLANT TO FALSE TAX RETURNS WERE
NOT AUTHENTICATED AND SHOULD NOT
HAVE BEEN ADMITTED.

The Government's handwriting expert, Louis Caputo, testified that the false tax returns (GX-1-7) were written by the same person who wrote two joint tax returns of Frank and Jeanne Mangan (GX-38 and 40) and also forms contained in Frank's personnel file (GX-43), which the Government claimed to be examples of Frank's writing. Yet there was no testimony that Frank wrote any of those documents. The expert did not utilize the signatures in the exemplars (476),* but only the writing in the body of the instruments, which in the questioned samples was entirely in handwritten block capitals.**

Appellant's attorney stipulated that it would not be necessary to call a witness to testify that the exemplars came from files of the IRS (473), but objected to their being admissible as self-authenticating (473-474). After lengthy argument the court admitted the proffered documents as exemplars (496). The court expressly based its ruling on several factors (494):

*The signatures would presumably have been self-authenticating under 26 U.S.C. §6064, which provides that the signature on a taxpayer's return is presumptively the signature of the taxpayer.

**Nor did the expert use a large volume of specimens of Frank's writing supplied at the request of the prosecution, although they were placed in evidence (GX-49A-49G), or three other tax returns of Frank and Jeanne Mangan (GX-39, 41, 42).

(1) the statutory presumption that the signature on Frank's tax returns was his own and its similarity to the signature on the papers in the IRS personnel file, (2) the papers in the personnel file are the kind "you would expect the individual concerned to be filling out, specially [sic] under the circumstances," and (3) the "lettered portions" (apparently the material in handwritten block capitals) appear to be the same on the tax returns and on the writings in the personnel file.

The fault in the court's analysis is immediately apparent. By relying on what appeared to be similarities, the judge was expressing an opinion on a matter which required expertise. Beyond that, the court was using similarities between two unauthenticated groups of writing to authenticate both. This was a bootstrap operation. That there may have been the similarities noted by the judge did not lend weight to the proposition that either, or both, were in the hand of Frank Mangan.

The law is clear that there must be satisfactory proof to authenticate handwriting exemplars before they can be used for comparison with questioned writings. First, there is the controlling statute, 28 U.S.C. §1371:

The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine the genuineness of other handwriting attributable to such person.

(Emphasis added).

Certainly the proposed exemplars were not self-authenticating, for self-authentication applies only to a limited number of official documents, public records, and similar items, Rule 902, Federal Rules of Evidence.

As Wigmore notes, "The foundation on which rests the necessity of authentication is not any artificial principle of evidence, but an inherent logical necessity." 7 WIGMORE ON EVIDENCE §2129 (3d ed. 1940) (emphasis in the original). It is directly related to the issue to be proved -- in this case that Frank wrote the false tax returns. But no matter how compelling the testimony might be that the questioned documents and the exemplars were written by the same person, that testimony was legally worthless unless the exemplars were shown to be in the writing of Frank Mangan. Yet the impact on the jury of such testimony is likely to be devastating.

Unquestionably, authentication may be proved by circumstantial evidence, but evidence there must be. With one exception, no reported case found by counsel has held that authentication of exemplars may be established solely by the content of the document alone, without some additional testimony.

In the venerable Dean v. United States, 246 Fed. 568 (5th Cir. 1917), a personal memorandum book was admitted as an exemplar where it appeared, from its nature and its contents, to be of a kind customarily kept in its owner's handwriting. But there was, in addition, testimony that the book was in the

defendant's possession at the time of his arrest. In United States v. Swan, 396 F.2d 883 (2d Cir.), cert. denied, 393 U.S. 923 (1968), a Columbia University admission application form and registration cards were admitted as exemplars, but with testimony from a university official that it was customary for students to fill out their own registration cards and the opinion of an accomplice that the writing was similar to the defendant's.

In United States v. Reed, 439 F.2d 1 (2d Cir. 1971), two motel registration cards and a W-4 tax withholding form were used as exemplars. But there was testimony by a motel manager that one of the registration cards was made out by a man he recognized as "one of the Reed brothers," coupled with the use in both of the same fictitious surname and business. United States v. Garelle, 438 F.2d 366 (2d Cir. 1970), cert. denied, 401 U.S. 967 (1971), approved the use of a letter bearing the defendant's partial signature. But there was testimony both that the letter was found in the defendant's possession and that its contents corresponded to the content of the Government's "repatriation file."

A similar pattern runs through other cases. Handwriting in monthly probation reports in a defendant's probation file was admitted in United States v. White, 444 F.2d 1274 (5th Cir.), cert. denied, 404 U.S. 949 (1971), where there was additional testimony by a probation officer that "it is very unlikely that anyone other than [the defendant] prepared and executed these

documents."

On the other hand, attempts to utilize documents as exemplars by self-authentication alone have been struck down. A conviction was reversed in United States v. Wagner, 475 F.2d 121 (10th Cir. 1973), where signatures purporting to be the defendant's on documents filed in other litigation were used as exemplars. The same result occurred in Citizens Bank & Trust Co. v. Allen, 43 F.2d 549 (4th Cir. 1930), where, in an action on a promissory note, signatures purporting to be the defendant's on other promissory notes had been used as exemplars.

Only one case appears to depart from the mainstream. In United States v. Liguori, 373 F.2d 304 (2d Cir. 1967), this Court held that use of documents, apparently self-authenticated, was proper. But in that case four different kinds of documents were used -- a lease application, key application, automobile registration, and a chauffeur's application -- and they were tied together by expert testimony that all had been written by the same person.*

In this case there was no direct evidence that the tax returns used as exemplars of Frank's writing were written by

*Liguori's value as authority is weakened by the fact that the issue was not briefed. Appellant's brief simply asserted that the exemplars "were never identified to the appellant." No argument was made; no cases were cited. United States v. Liguori, brief of appellant at 9. The Government's brief responded with the bare statement that the exemplars had been admitted without objection as business records. Id., brief of appellee at 9. In the absence of argument or authority, it is understandable that this Court gave only cursory consideration to the issue.

him, and there are no circumstances which lead to that conclusion. Certainly it is a matter of notice that tax returns are frequently prepared by persons other than the taxpayer, and here, moreover, the returns were the joint filing of appellant and his wife. Similarly, the existence of handwriting in papers in appellant's personnel file is no proof that the handwriting is his.

The cases are clear that the Government must establish a prima facie case that the exemplars are what they purport to be, United States v. Swan, supra. In this case there was little more than conjecture.

Point III

THE TRIAL COURT ERRED IN RECEIVING
IN EVIDENCE APPELLANT'S INCOME TAX
RETURNS WHICH HAD BEEN DISCLOSED IN
VIOLATION OF THE TAX REFORM ACT OF
1976.

When the Government offered the joint income tax return filed on behalf of appellant and his wife, defense counsel objected and moved to exclude them on the ground that their disclosure would be in violation of the confidentiality provisions of the 1976 Tax Reform Act, Oct. 4, 1976, P.L. 94-455, Title XII, §1202, 26 U.S.C. §§6103 and 7213. After extensive argument (496-503, 527-545), the motion was denied and the returns were admitted as Government Exhibits 38 to 42. They were then used for two highly prejudicial purposes. They served as exemplars for a handwriting expert's opinion that the fictitious McCarthy and Murphy returns, which were the basis of the prosecution, had been written by the person who prepared appellant's returns. In addition, Government witness Petito used the returns as the basis for testimony purporting to show that during 1972, when refunds were paid on the false McCarthy-Murphy returns, appellant invested in securities having a market value of \$12,000, and that appellant had claimed substantial partnership losses -- as did the fictitious returns. Clearly the testimony deriving from appellant's tax returns was a crucial factor in the jury's guilty verdict. It was the basis for the expert opinion that Frank wrote the material in the

false McCarthy-Murphy tax returns. That, in turn, was the principal link "proving" Frank to be a member of the conspiracy, which was a necessary (although inadequate) foundation for admission of Bertsch's hearsay testimony. The only other evidence connecting appellant with this scheme -- his employment by the Internal Revenue Service and his being Kevin's brother -- would not have supported a conviction.

The Tax Reform Act of 1976 amended the confidentiality and disclosure provisions of 26 U.S.C. §6103 and the penalty provisions of 26 U.S.C. §7213 to limit drastically the circumstances in which tax returns and the information contained in them may be disclosed. As explained in the Senate Report, S.Rep. 91-938, at 317, 1976 U.S.C.C.A. 3439, 3747, there are two compelling reasons for limiting disclosure: the citizen's reasonable expectation of privacy and the effect on the collection of revenue under our voluntary assessment system if there are abuses in disclosing tax returns. Congress decided that a taxpayer is "entitled to essentially the same degree of privacy [with respect to tax returns] as those papers maintained in his home," id. at 328, 1976 U.S.C.C.A. at 3757.

The statute provides for different procedures in different situations and the first issue is whether the disclosure of appellant's returns to the Department of Justice, to the handwriting expert, and their submission in evidence at this trial was "for the purposes of tax administration," 28 U.S.C. §6103(h), or was part of a "nontax" investigation and judicial proceeding,

39 U.S.C. §6103(i). Judge Stewart concluded that the prosecution was a tax administration matter within the meaning of subdivision (h) (in which the disclosure procedure is less restrictive) (545). Although it was "arguable" that it was a non-tax matter, it was "more likely that [subsection] H applies" (546).

In this case, the indictment charges the violation of three criminal statutes: 18 U.S.C. §286 (conspiring to file false claims against the Government), 18 U.S.C. §§1341, 1342 (mail fraud), and 26 U.S.C. §7206(2) (aiding and assisting the preparation and presentation of fraudulent and false returns). Underlying all the charges was the single scheme involving the fictitious McCarthy-Murphy tax returns.

To the extent of the false claims and mail fraud counts, there was no question of tax administration. But more important, the scheme itself did not involve taxes. It was, rather, a scheme for making false claims which happened to be submitted to the Internal Revenue Service. Here there was no failure to report income, nor a claim of false deductions or credits. Thus, even though a violation of the Internal Revenue Code was charged, tax administration was not involved.

This view is borne out by the Senate Report on the Tax Reform Act of 1976, in its discussion of disclosure in tax cases. The Committee obviously intended "tax administration" to relate only to cases in which the tax liability of the defendant was in issue:

While the committee decided to maintain the present rules pertaining to the disclosure of returns and return information of the taxpayer whose civil and criminal liability is at issue, restrictions were imposed in certain instances at the pretrial and trial levels....

S.Rep. 91-938 at 324-325,
1976 U.S.C.C.A. at 3754
(emphasis added).

The very nature of the use of appellant's tax returns -- as handwriting exemplars and to show "sudden affluence" as circumstantial evidence of guilt -- demonstrates the non-tax nature of this case. If the filing of a false claim were to be deemed a tax administration matter simply because the claim is a tax return, then there would be almost no criminal act which results in financial gain that would not involve tax administration: the proceeds of criminal enterprises are generally not reported as taxable income, and the substantive crime could therefore be deemed a plan to file a false return, i.e., a return which omitted the proceeds of the crime, as was done in United States v. Hilton, 534 F.2d 556 (3d Cir. 1976).

In a non-tax case, §6103(i) requires a court order, based upon essentially the same facts as would support a search warrant, before tax returns may be disclosed to the Department of Justice, and a further court order before they can be used as evidence at trial. This was not done.

Even if this be held to be a matter of tax administration, §6103(h)(3)(A) requires authorization of the "Secretary" as a condition to disclosing returns to the Department of Justice.

The Internal Revenue Code explicitly defines "Secretary" in §7701. The definition, as amended by the Tax Reform Act of 1976, is found in subdivisions (11) and (12) of that section:

(11) Secretary of the Treasury and Secretary.—

(A) Secretary of the Treasury.— The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary.— The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate.—

(A) In general.—The term "or his delegate" —

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more re-delegations of authority, to perform the function mentioned or described in the context....

The record indicates that the returns were simply handed to the prosecutor by an IRS inspector (535). There was no suggestion that any duly authorized delegate of the Secretary of the Treasury directed the disclosure or even that anyone higher in authority than the inspector had knowledge of it.

Having offered the tax returns in evidence, it was the Government's burden to establish their admissibility, 1 WIGMORE ON EVIDENCE §18(E) at 347 (3d ed. 1940). In the absence of any proof at all that the statute had been complied with, the returns should have been excluded.

The Code imposes severe criminal penalties for improper disclosure, 26 U.S.C. §7213(a) (felony, with maximum sentence of five years and fine of \$5,000 and, if a government employee, dismissal), and also damages, with a minimum of \$1,000 for each disclosure, 26 U.S.C. §7217. These demonstrate that disclosure is indeed a serious matter. Even under prior law improper disclosure by the Government was found to be "shocking and high-handed treatment of taxpayers and a complete evasion of congressional purpose in 26 U.S.C. §7213," United States v. Sapp, 371 F.Supp. 532 (S.D.Fla. 1974).

Although counsel presented the question as an objection to the anticipated evidence (496), Judge Stewart concluded that the application was to suppress evidence, and therefore came within Rule 12(b) of the Federal Rules of Criminal Procedure, under which suppression must be sought prior to trial or be waived (545). That conclusion appears to be erroneous. Suppression is the customary vehicle to deal with evidence obtained in violation of the Constitution. Here the question is one of admissibility of evidence. Although Congress expressly indicated that the privacy of tax returns is akin to the privacy of papers in one's own home, the prohibition against disclosure is based on the statute, not the Constitution, and the objection was properly raised during trial.

A principal reason for requiring a suppression motion to be made prior to trial is that a hearing is generally required to resolve factual questions, and a hearing in the midst of trial

would disrupt orderly proceedings. Here there was no need for a hearing, but only a question of application of the statute.

If the issue is deemed to be one of suppression and therefore governed by Rule 12(b), then this Court should grant relief from the automatic waiver. Rule 12(f) expressly permits "the court" to grant such relief. The reviewing court, as well as the trial court, has that power, United States v. Lardieri, 497 F.2d 317, 321 (3d Cir. 1974); United States v. Gougis, 374 F.2d 758, 762 (7th Cir. 1967); 8 MOORE'S FEDERAL PRACTICE, CRIMINAL RULES ¶12.03[3]. In this case, the issue arose under a recently-enacted statute never interpreted by the courts. The failure to assert it prior to trial was certainly an excusable omission. In view of the crucial role of appellant's tax returns, relief from the waiver should be granted.

Judge Stewart also concluded that if the issue was disclosure under §6103(i) -- that is, for use in a non-tax criminal proceeding -- he would issue a nunc pro tunc order under that subsection to cure the defects in the prior disclosure. The strictures of the statute are not so easily overcome, however. Since §6103 is based upon a right to privacy, the statute is analogous to the Fourth Amendment, and the orders required as condition for disclosure under §6103(i) are the equivalent of search warrants. It would be absurd to suggest that an illegal search and seizure could be cured by a nunc pro tunc search warrant issued during trial. Yet that is essentially what Judge Stewart suggested when he offered to issue a nunc pro tunc order

to legitimize the disclosure which had already been made.

This appears to be a matter of first impression, and no cases have been found which deal with the admissibility of tax returns which have been disclosed in violation of §6103.* Because of the deep concern of Congress in permitting disclosure only under tightly controlled procedures, the statute should be given broad effect.

*Cf. United States v. Tucker, 316 F.Supp. 822 (D.Conn. 1970), dealing with disclosure as a violation of the statute prior to the 1976 amendments.

Point IV

THE TRIAL COURT ERRED IN ADMITTING
EVIDENCE OF APPELLANT'S PURCHASES
AND SALES OF SECURITIES AS PROOF
OF SUDDEN ACQUISITION OF WEALTH.

Through an Internal Revenue Service employee, John Petito, the Government offered in evidence a chart (GX-78) which Mr. Petito had prepared from the schedules of gains and losses in appellant's 1972 and 1973 tax returns. In an extended argument, its admission was objected to on the ground that it was misleading and based on unsupported assumptions (1189-1195, 1216). The objection was overruled and the chart admitted (1196, 1216). Mr. Petito then testified, on the basis of the chart, that during the period after refund payments were made on the McCarthy-Murphy tax returns, Frank purchased securities having prices \$12,123.17 greater than the total price of securities sold. A later motion to strike the testimony and the exhibit was denied (1447-1448).

The intended implication, of course, was that appellant was engaging in securities transactions with the proceeds of the criminal venture. The point was argued vigorously by the prosecutor in summation (1511-1512, 1628).

The generally accepted rule as to the admissibility of evidence of wealth of a defendant as probative of his guilt of crime is that stated by Wigmore §154 (3d ed. 1940): It is relevant to establish "sudden possession, i.e., to show

that before [the crime] the person was without money, while immediately after that time he had a great deal" (emphasis in the original), leading to an inference that the acquisition was dishonest.*

Most of the recent cases follow the Wigmore rule, e.g., "Evidence of sudden acquisition of large amounts of money is also admissible to prove criminal misconduct when pecuniary gain, as here, is the basic motive," United States v. Tramunti, 513 F.2d 1087, 1105 (2d Cir.), cert. denied, 423 U.S. 832 (1975) (emphasis in the original). While it is not required to trace the wealth to its source as a condition for admissibility, it must be shown that the acquisition was sudden. That can be done only by showing the defendant's meager financial condition prior to the crime and contrasting it to his affluence afterward. Case after case has followed that procedure, e.g., United States v. Jackskion, supra; United States v. Ravich, 421 F.2d 1196, 1204 (2d Cir.), cert. denied, 400 U.S. 834 (1970); United States v. Trudo, 449 F.2d 649 (2d Cir. 1971), cert. denied, 405 U.S. 926 (1972); Hansbrough v. United States, 156 F.2d 327 (8th Cir. 1946).

*Williams v. United States, 168 U.S. 382, 396 (1897), had held such evidence admissible only if some connection were shown between the new wealth of the defendant and the proceeds of the crime. Wigmore, id., was contemptuously critical of Williams, and the case was rather summarily discarded in O'Shea v. United States, 93 F.2d 169, 172 (6th Cir. 1937), on the dubious ground that its facts were distinguishable, and in United States v. Jackskion, 102 F.2d 683, 684 (2d Cir.), cert. denied, 307 U.S. 635 (1939), on the assertion that in Williams "no general rule of evidence was laid down."

No attempt was made to show that appellant's "wealth" was suddenly acquired, or even that it constituted affluence. The chart in issue itself demonstrated that his securities purchases began years before: in 1972 he sold stocks which had been acquired between April 1968 and January 1972 for a total sales price of \$19,319. Thus, his investment program had been proceeding on a substantial scale for four years prior to the issuance of the first fraudulent refund check. Moreover, the fact that securities with a market value of \$12,000 were purchased does not mean that appellant actually paid \$12,000 for them, or that any payment was made after the refund checks began being issued. Obviously the purchases could have been made on margin (which would have required only 50 per cent. of the price to be advanced), or with the proceeds of a loan from other sources. The necessary funds may have already been in appellant's brokerage account prior to the purchases; they may have come from appellant's pre-existing savings. The bare fact of appellant's purchase of \$12,000 worth of securities therefore was probative of nothing.

It will undoubtedly be argued that the explanatory factors were brought out in the cross-examination of Mr. Petito, so that no prejudice was suffered. This overlooks the dramatic impact which evidence of the stock purchases must have had on the jury, particularly in view of the prosecutor's aggressive use of the matter during his summation. The issue is very much like that discussed by Wigmore in his famous comment on the impact of

physical evidence, WIGMORE ON EVIDENCE §2129 (3d ed. 1940). He posited the case of a prosecution for stealing a horse, in which a witness brings a horse into the courtroom, accuses the defendant, and states, "If you doubt me, there is the very horse!" Wigmore goes on to observe:

The sight of the horse, corroborating in the flesh, as it were, part of the witness' testimony, tends to verify the remainder. This tendency, illogical though it may be, is deeply rooted in all persons, even the most intelligent and reflective.

In this case the evidence of appellant's securities transactions, by itself, had no tendency to establish guilt. But its solemn introduction by a witness characterized in summation as not merely a revenue agent, but "a supervisor, he supervises agents" (1511), points a finger of guilt as prejudicial as the horse in Wigmore's example.

In the absence of proof that appellant had no financial resources prior to the crime and in the absence of proof that he actually expended large sums of cash in purchasing securities after the crime, the evidence should have been excluded.

In one recent case this Court may appear to have made inroads into the longstanding rule that a defendant's prior impecuniosity must be shown before evidence of affluence is admissible. In United States v. Falley, 489 F.2d 33, 39-40 (2d Cir. 1973), it was held that evidence of affluence (\$20,000 spent in foreign air travel) was admissible despite the failure of the Government to establish prior impecuniosity. As authority, the Court cited four cases: United States v. Goldenstein, 456 F.2d

1006 (8th Cir. 1972); United States v. Mirenda, 443 F.2d 1351 (9th Cir.), cert. denied sub nom. Verdugo-Medina v. United States, 404 U.S. 966 (1971); United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971), and United States v. Brewer, 427 F.2d 409 (10th Cir. 1970). It is instructive to examine those authorities. The Goldenstein case relies solely upon United States v. Crisp, supra. Crisp, in return, cites as authority for the proposition only United States v. Brewer, supra. And the Brewer case relies upon Thompson v. United States, 389 F.2d 37, 38 (9th Cir.), cert. denied, 391 U.S. 903 (1968), and Self v. United States, 249 F.2d 32, 34-35 (5th Cir. 1957).

Neither Thompson nor Self supports the proposition in any way. Thompson expressly found the relevance of the evidence not to be in the large amount of money involved (only \$3,000), but rather in the unusual circumstances of its being cash in small denominations and carried in a brown paper shopping bag. Nor does Self support the thesis. The court in Self acknowledged the general rule that

unexplained possession of unusual amounts of money after a robbery, standing alone, is not competent evidence to connect the possession with the robbery; but it becomes competent provided it is further shown that he was impecunious prior thereto.

Id., 249 F.2d at 35.

The court, however, found the evidence of the defendant's possession of money admissible because other evidence connected it

with the money taken in the bank robbery.*

In United States v. Mirenda, supra, as in Self, there was sufficient connection between the money found in the defendant's possession and the crime to render the evidence admissible. 443 F.2d at 1357.

Thus the cases upon which Falley rests provide weak support indeed for the rule of evidence set forth. The Court in Falley did go beyond those cases, however, and explained the rationale for the rule. It noted that in the analogous situation where a tax evasion charge is based on net worth evidence, the defendant's net worth at the beginning of the period must be shown. In those cases, however, the defendant's lavish standard of living is generally the only evidence of guilt. On the other hand, in the cases where possession of money is sought to be used as evidence of other crimes involving pecuniary gain, there will be other evidence, since the financial evidence alone does not make out a prima facie case. Therefore, there is no danger that the evidence of possession of money would be used as conclusive evidence of guilt, and no need to surround its admission with the safeguards mandated in the net worth tax fraud cases.

This rationale has disturbing implications. Mere possession of money carries no implication of guilt of a crime. It

*Moreover, the court's consideration of the issue was dicta, since it had held that the question was waived by failure to object at trial.

is only where there is sudden affluence after the commission of a crime that guilt is suggested, and even that is circumstantial evidence of the most tenuous sort. To allow evidence of affluence to be admitted without first showing prior impecunity can have distressing consequences. If, excluding the financial testimony, a jury finds the evidence in equipoise, but the financial evidence tips the scale and produces a guilty verdict, then the conviction will rest on evidence which is not probative of guilt. The Falley rule also places an impermissible burden on a defendant to explain or mitigate the financial testimony. Falley ignored the well established rule in this Circuit that prior impecunity must be proved, and Falley itself was ignored by this Court in Tramunti, supra, where the rule was stated as relating to sudden acquisition of wealth. In view of these problems we believe that the doctrine of Falley should be limited to facts like those in Falley, where the affluence was indicated by highly unusual expenditures which are grossly out of proportion to the defendant's legitimate income during the period,* or where the affluence is evidenced by inordinate amounts of cash, or where there are other circumstances which are inherently suspicious.

*In Falley, the defendant's income tax returns reported a total of \$10,000 income during the same period that \$20,000 was spent on air fares, 489 F.2d at 38 n.1.

There must be a reversal where a conviction rests on proof of modest stock purchases which were well within the means of a middle class citizen.

Point V

INSOFAR AS THEY ARE NOT INCONSISTENT WITH ARGUMENTS RAISED THIS BRIEF, APPELLANT FRANK MANGAN ADOPTS THE ARGUMENTS RAISED IN THE BRIEF OF CO-APPELLANT KEVIN MANGAN.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the indictment dismissed; alternatively, a new trial should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 17, 1977

I certify that a copy of this ^{BRIEF} ~~notice of motion and~~
~~affidavit~~ has been mailed to the United States Attorney
for the Southern District of New York ~~and to co-counsel.~~

Harry Wil